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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 869

NATIONAL BISCUIT DIVISION (BISCUIT COUNCIL, BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA), as bargaining agent and contractual representative of certain employees of the National Biscuit Company, *Petitioner*

v.

BOYD LEEDOM (CHAIRMAN), PHILIP RAY RODGERS, STEPHEN S. BEAN, JOSEPH A. JENKINS, and JOHN H. FANNING, individually and as members of the National Labor Relations Board, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Biscuit Division (Biscuit Council, Bakery and Confectionery Workers' International Union of America) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on January 29, 1959.



OPINION BELOW

The United States District Court for the District of Columbia dismissed the complaint on July 17, 1958, without opinion (J.A. 232).[1] The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pp. 10a-12a, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1959 (infra, p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, despite the statutory command that it apply "the same regulations and rules of decision * * * irrespective of the identity of the persons" before it in a representation proceeding (section 9(c)(2) of the National Labor Relations Act, 29 U.S.C. 159(c)(2), infra, pp. 3-4, 7a), may nevertheless take into consideration the identity of a labor organization so that the Board will direct an election during a contract term *solely* because the contractual bargaining agent is affiliated with a union expelled from the AFL-CIO.

2. Whether the Labor Board's rule, that the existence of a question concerning representation may depend solely upon expulsion action taken by the AFL-CIO—since, but for the fact of expulsion, concededly no question concerning representation would exist under the Board's rule—is not in itself an un-

[1] References herein to J.A. are to the Joint Appendix prepared for the use of the Court of Appeals.

lawful delegation of Board authority to a private organization, namely, the AFL-CIO.

3. Whether this Board rule does not depart from statutory requirements and from constitutional requirements of due process (see *Inland Empire District Council, etc.* v. *Millis*, 325 U.S. 697, 700) and deprive the contractual collective bargaining agent of a right assured to it by Congress so as to give a district court "jurisdiction of an original suit to prevent deprivation of [the] right so given". (*Leedom* v. *Kyne*, 358 U.S. 184, 189).

4. Whether the Board may abrogate, prior to its expiration date, an existing 17-plant collective bargaining agreement which is not contrary to any policy of the National Labor Relations Act and which the existing bargaining agent is willing and able to administer in accordance with the Act.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent portion of the Fifth Amendment to the Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

Section 9(c)(2) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947 (Act of July 5, 1935, 49 Stat. 449, as amended by the Act of June 23, 1947, 61 Stat. 136), 29 U.S.C. 159(c)(2), provides in pertinent part:

> "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply ir-

respective of the identity of the persons filing the petition or the kind of relief sought * * *."

Other pertinent provisions of the National Labor Relations Act and section 10 of the Administrative Procedure Act (Act of June 11, 1946), 60 Stat. 243, 5 U.S.C. 1009, are set out in Appendix A, infra, pp. 1a-9a.

STATEMENT

Petitioner is affiliated with the Bakery and Confectionery Workers' International Union of America (herein called "BCW") and is a labor organization within the meaning of section 2(5) of the National Labor Relations Act (herein called the "Act"), 29 U.S.C. 152(5). (J.A. 2, 50-51, 57-59). Since at least 1954 petitioner has been the exclusive collective bargaining representative of approximately 10,000 employees of the National Biscuit Company (herein called "Nabisco") at 17 Nabisco biscuit and cracker plants throughout the United States. Petitioner's current collective bargaining agreement with Nabisco (J.A. 69-197) covering such employees became effective as of September 1, 1957, and expires August 31, 1959 (J.A. 6, 108).

Commencing in December 1957 certain former officers and members of BCW locals in Atlanta, Georgia, Cambridge, Massachusetts, Buffalo, New York, and Philadelphia and York, Pennsylanvia, seized the assets and facilities of those locals and purported to disaffiliate or secede from the BCW (J.A. 7-8). In each such case, the seceding members appropriated the identifying number of the local union involved and

thereafter represented that the local had become affiliated with a new organization known as the American Bakery and Confectionery Workers' International Union (herein called "ABC") (J.A. 8).

Shortly thereafter these ABC locals petitioned the National Labor Relations Board (herein called the "Board") to conduct representation elections among the Nabisco employees in their respective areas, notwithstanding the existence and terms of the current contract between petitioner and Nabisco (J.A. 8). The Board thereupon instituted hearings and proceedings pursuant to Section 9(c) of the Act (29 U.S.C. 159(c)) to determine whether bona fide questions of representation existed within the meaning of the Act (J.A. 9). Petitioner and Nabisco appeared at these hearings. Petitioner took the position at each hearing that its contract with Nabisco was valid in all respects and therefore was a bar to representation proceedings, and that, in any event, the only appropriate unit was the contractual single unit comprising employees at all 17 Nabisco biscuit and cracker plants (J.A. 9). Nabisco itself took the position that it was bound by the agreement covering all its biscuit and cracker plants and urged the Board to treat that agreement as a bar to elections (J.A. 63-66).

The Board nevertheless, on June 30, 1958, found petitioner's Nabisco contract no bar and directed separate representation elections to be held within 30 days among the Nabisco employees in Cambridge, Massachusetts, Buffalo, New York, Atlanta, Georgia, and Philadelphia and York, Pennsylanvia (J.A. 10, 17-27). In so doing, the Board referred to the BCW's expul-

sion from the AFL-CIO and concluded that "a schism exists in Local 431 of the Bakery Workers which affects the Buffalo plant unit included in the master agreement. Therefore, that contract is no bar to the requested election. *International Harvester Company, East Moline Works*, 108 NLRB 600, ftn. 11." (J.A. 18).[2]

Petitioner thereupon brought this action in the United States District Court for the District of Columbia, against the respondents individually and as members of the Board, to declare the respondents' action unlawful and for injunctive relief. The complaint alleged that the June 30 Decisions and Directions of Elections violated the Act and particularly section 9(c)(2) thereof in that respondents had applied rules of decision against petitioner different from the Board's usual rules solely because of petitioner's affiliation with BCW, an International Union which had been expelled by the AFL-CIO (J.A. 13). The complaint further alleged, *inter alia*, that the effect of respondents' decisions, based as they were upon the fact of the BCW's expulsion by the AFL-CIO, was to delegate to the AFL-CIO and its affiliate, the ABC, the Board's statutory authority to determine the existence of a question concerning representation affecting commerce within the meaning of section 9 of the Act (J.A. 13-14). It alleged that a further result of respondents' decisions was to destroy peti-

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[2] The Board incorporated this ruling in the Buffalo, N. Y. case by reference in each of the other Wabisco decisions, and physically attached the decision therein to each of the other decisions. J.A. 21, fn. 3; 23, fn. 2; 26, fn. 2. For the significance of the Board's citation of the *International Harvester, East Moline* case, see p. 11, *infra*.

tioner's existing Nabisco contract in violation of the Act and without due process of law (J.A. 14).[3]

Respondents moved to dismiss the complaint and the district court (Holtzoff, J.) granted their motion on the authority of *DePratter v. Farmer*, 98 U.S. App. D.C. 74, 232 F. 2d 74 (J.A. 230, 232).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed, stating without discussion that the district court was "clearly right" in holding "that the Board's determination that the elections were warranted in the interest of stable bargaining relationships was within allowable limits of the Board's discretion and was not prohibited by § 9(c)(2)." (*Infra*, p. 12a).

REASONS FOR GRANTING THE WRIT

1. The court below was in error in failing to recognize that this case, as shown on the face of the complaint, clearly involves respondents' "departure from statutory requirements [and] from those of due process." See *Inland Empire District Council, etc. v. Millis*, 325 U.S. 697, 700. Under the Court of Appeals' own decision (*Leedom v. Kyne*, 249 F. 2d 490), affirmed by this Court (358 U.S. 184), the district

[3] The complaint also alleged that the respondents' unit finding—that single plant units were appropriate—was arbitrary and capricious under the Board's own rules of decision and that the unit finding constituted a further instance of respondents' discrimination against petitioner in violation of section 9(c)(2) of the Act and of the Fifth Amendment (J.A. 10-13, 27-39, 43-49). Cf. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260; *Service v. Dulles*, 354 U.S. 363.

Jurisdiction of the district court was invoked under 28 U.S.C. 1337, 2201, and 2202 and District of Columbia Code (1951 ed.) secs. 11-305 and 11-306 (J.A. 4-5).

court was in error in dismissing the complaint, and should have been reversed by the court below.

Nor was respondents' "unlawful action" of such a nature as requires great "ingenuity of counsel" to find. See *Leedom* v. *Kyne*, dissenting opinion, 358 U.S. 184, 191, 195. The command of section 9(c)(2) of the Act is clear and plain for all who will see:

> "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought * * *."

This statutory expression of the constitutional assurance of equal protection of the law was flouted by respondents in the Nabisco decisions here attacked. See pp. 10-14, *infra*.

The purpose of section 9(c)(2), inserted in the Act by the Taft-Hartley amendments of 1947, was to require the Board to apply in representation proceedings the same rules of decision and otherwise to accord the same treatment to independent labor organizations as to unions affiliated with federations like the AFL-CIO. The language of the section is clear as to this, and its legislative history, revealed in the Senate and House Reports and in the House Conference Report, is unequivocal to the same effect.[4] Debate on the

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[4] The Senate and House bills contained language substantially like that of section 9(c)(2) as finally enacted. See H.R. 3020, section 9(f)(4), and Senate Bill 1126, section 9(c)(2) (80th Cong., 1st Sess.). House Conference Report 510 on H.R. 3020, June 6, 1947, explained, at page 48, that "the Conference Agreement contains a provision having the same force and effect" as the provisions in the original versions "requiring the Board to treat independent unions in the same manner in which it treats unions which are affiliated with or constitute units of labor organizations,

floor of both Houses of Congress on the Taft-Hartley bill also shows that section 9(c)(2) was designed to protect independent, unaffilfated labor unions from discrimination by a labor board inclined to prefer unions affiliated with one of the two leading labor federations, the American Federation of Labor or the Congress of Industrial Organizations, now merged into one giant federation known as the "AFL-CIO". Thus, Representative Hartley, for whom the final bill was named in part, told the House that:

> "This bill also protects the existence of labor organizations which are not affiliated with one of the National Federations." 93 Cong. Rec. 3533, April 15, 1947.

On the Senate side, Senator Ball, a proponent of the measure, stated that the bill

> "requires that independent unions and unions affiliated with national and international organizations must be treated in the same way by the NLRB, which now is so biased in favor of the two great federations, that it has one rule for unions belonging to those federations and a completely different and much harsher rule for deal-

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national or international in scope . . ." See id, page 40. Also see Senator Taft's explanation, 93 Cong. Rec. 6601, June 5, 1947. In accord is House Report No. 245, on H.R. 3020 (80th Cong., 1st Sess.), April 11, 1947, which states the objectives of the original House bill:

> "It *protects* the existence of *labor organizations* which are *not affiliated* with one of the national federations." Page 5. [Emphasis supplied] Also, pp. 7, 38.

Similarly, Senate Report No. 105 on S. 1126, April 17, 1947, explained the Senate Bill's purpose as being "that independent and affiliated unions be accorded similar treatment . . ." P. 25

ing with independent unions." 93 Cong. Rec. 5147, May 12, 1947.[5]

Although those pro and con the Taft-Hartley bill disagreed as to whether the Board had been discriminating against truly independent unions and as to whether the equal-treatment requirement of 9(c)(2) would give some encouragement and protection to so-called company unions, both sides were in agreement as to what 9(c)(2) meant. The simple and general "due process" language of section 9(c)(2)—that representation case rules shall be the same regardless of "identity"—was a congressional command that the same rules of decision apply to independent, unaffiliated unions and to AFL-CIO affiliates alike. The provision, therefore, prohibits the Board, in making its decision in a representation proceeding, from relying on the identity of a party to that proceeding and from applying different rules and reaching different results depending upon petitioner's affiliation or nonaffiliation with the AFL-CIO.

Yet in the instant Nabisco cases respondents did the very thing which the Congress, in section 9(c)(2), explicitly proscribed. They held that there was a

[5] Respondents' argument in the court below, that the sole purpose of section 9(c)(2) was to stop the Board from applying more stringent remedial orders under section 8 of the Act against company-dominated "independent" unions than against unions affiliated with the AF of L or CIO, is completely without merit. Another specific amendment to the Act aimed at Board discrimination in this area is to be found in section 10(c), 29 U.S.C. 160(c), a section dealing with remedying unfair labor practices. On the other hand, section 9 of the Act is concerned only with representation proceedings. Surely the Congress did not amend section 9, by adding 9(c)(2), in order to modify Board practice under section 8 or 10.

question of representation within the meaning of section 9(c)(1) (29 U.S.C. 159(c)(1)) despite petitioner's current Nabisco contract asserted as a bar to representation proceedings. Respondents based this holding upon the Board's so-called *Lawrence Leather* rule.[6] This rule, as delineated in *A. C. Lawrence Leather Company*, 108 NLRB 546 (1954), provides:

[6] The only authority cited by respondents as a basis for their holding that there was no contract bar to the Nabisco elections was "*International Harvester Company, East Moline Works*, 108 NLRB 600, ftn. 11" (J.A. 18, fn. 3). In that case, which was merely another application of the *Lawrence Leather* rule, the Board held:

> "Accordingly where the expulsion of a labor organization from its parent has been followed by disaffiliation at the local level for reasons related to the expulsion, as in the instant case, the Board will find that schism exists which warrants directing an immediate election notwithstanding the existence of a contract which would otherwise bar a determination of representatives. Accordingly, we find that the contract between the Employer and the Intervenors . . . does not bar this proceeding.[11]" 34 LRRM at p. 1067.

And footnote 11 to this statement, cited by respondents as authority for finding no contract bar in the Nabisco proceedings, reads as follows:

> "[11] *A. C. Lawrence Leather Company*, 108 NLRB No. 88; 34 LRRM 1022.
>
> "The Employer contends that the schism doctrine should not be applied in the instant case because the disaffiliation was not coextensive with all the plants covered by its master agreement with UE. However, where, as here, the master agreement covers a number of units for which bargaining agents have been separately certified, it is sufficient that the disaffiliations be coextensive with a single one of the several bargaining units covered by the master agreement. *General Electric Company, Appliance Service Center*, 96 NLRB 566. As each of the disaffiliations in the instant case occurred in such a unit, we find no merit in this contention . . ."

"Where, therefore, a local group disaffiliates from a union expelled by its parent, for reasons related to the expulsions, as in this case, the Board will find that a schism exists which warrants directing an immediate election notwithstanding the existence of a contract with the union suffering the schism which would otherwise bar a determination of representatives." 108 NLRB, at 549.

As an independent commentator, Professor Clyde W. Summers of Yale Law School, has put it:

"* * * in *A. C. Lawrence Leather Co.* a special opening was made in the contract bar doctrine for [the left wing union] cases. Where 'a local group disaffiliates from a union expelled by its parent for reasons related to the expulsion,' the Board will direct an immediate election notwithstanding the existence of a contract. Through this gate, groups seceding from the ousted internationals paraded freely to elections, while other seceding groups struggled to surmount the contract bar.

* * * * *

"The double standard is self-evident.

* * * * *

"With the first BCW cases, the Board began to restudy its schism rules. Not surprisingly, the newly stated rules in *Hershey Chocolate Corp.*[7]

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[7] 121 NLRB No. 124, Sept. 18, 1958. It should be noted that the Hershey Chocolate rules, by which respondents' counsel sought in the court below to justify respondents' actions in the instant Nabisco cases, were promulgated some two and a half months after the Nabisco decisions were handed down.

Other independent commentators have thought it significant that "the *Hershey* decision was promulgated during the pendency before the District of Columbia Circuit of [the instant] case questioning the constitutionality of the Board's *Lawrence Leather*

hold wide the door to an election for locals seceding from the corrupt internationals which have been expelled from the AFL-CIO. At the same time, locals seceding from other internationals may find the door locked." Summers, *Union Schism in Perspective: Flexible Doctrines, Double Standards, and Projected Answers*, 45 Va. L. Rev. 261, 271-73 (1959).

It is this *Lawrence Leather* double standard, prohibited by both the Constitution and section 9(c)(2) of the Act, that the respondents applied in striking down petitioner's 17-plant Nabisco contract as a bar to elections and in directing elections to be held at some of those plants. In sum, respondents, in the actions here attacked, directed representation elections in certain biscuit and cracker plants of the National Biscuit Company solely because petitioner, the recognized contractual bargaining agent for all 17 such plants of the Company, was affiliated with a union which had been expelled from the AFL-CIO, whereas the groups seeking the elections claimed allegiance to that federation. Had the situation been reversed

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schism doctrine." Note, *The Schism Doctrine*, 45 Va. L. Rev. 211, 237 (1959). Indeed, *Hershey*, after having been held under advisement by the Board for over half a year, was promulgated by respondents on the very day that respondents' counsel filed their brief in the court below expounding *Hershey* doctrine in defense of the respondents' earlier application of *Lawrence Leather* in the Nabisco cases.

Regarding *Lawrence Leather* and *Hershey*, Professor Summers comments that "The Board • • • has in the past tailored its schism rules to fit the current fashions. In *Hershey Chocolate*, it has designed new rules so closely cut that they seem to fit the present needs of the AFL-CIO better than the Board's own basic premises." Summers, *Union Schism in Perspective: Flexible Doctrines, Double Standards, and Projected Answers*, 45 Va. L. Rev. 261, 274 (1959).

(i.e., had petitioner remained an AFL-CIO union and the schism otherwise been the same), no elections would have been directed and petitioner would have continued as the sole multiplant bargaining agent for the duration of its contract with Nabisco. Thus the Board did the very thing which the Congress, in 9(c)(2), explicitly condemned.

This being so, *Leedom* v. *Kyne, supra,* gives petitioner the right to judicial review of respondents' illegal actions, and the court below was in error in not according petitioner that right.

2. Plainly, the Board has felt little or no duty to dispense equal justice because, where it has applied the *Lawrence Leather* rule, invariably the victim has been a union which had been subjected to adverse publicity, and the beneficiary of the discriminatory rule was in the favor of the politically powerful labor federation which had expelled either the victim of the schism or its parent. We have demonstrated above, however, that in the light of the unambiguous statutory language of section 9(c)(2) and of its legislative history, respondents cannot validly find, as they did in these Nabisco cases, that the existence of a question concerning representation depends upon expulsion of petitioner's affiliate by the AFL-CIO. Such a finding not only is a reliance upon "identity" forbidden by 9(c)(2), but also constitutes an unlawful delegation of authority, vested by statute in the Board, to a private organization, the AFL-CIO.

3. Moreover, respondents exceeded their statutory authority by directing elections during the term of a valid subsisting agreement between petitioner and

Nabisco.* Early in its history the Board ruled that no representation question is raised upon the filing of an election petition during the term of a collective bargaining agreement of reasonable length where such agreement does not defeat "the policies and purposes of the Act." *Superior Electrical Products Co.*, 6 NLRB 19, 22 (1938). This rule, known as the "contract bar" rule, while thus enunciated by the Board in *Superior Electrical Products*, is actually a policy declared by the Act itself as if "written into the Statute" in *haec verba*. L. Hand, C. J., in *Fay* v. *Douds*, 172 F. 2d 720, 724 (C.A. 2).

This Court has repeatedly recognized the Board's lack of authority to set aside labor contracts unless such contracts in themselves thwart some policy of the Act. *Consolidated Edison Company* v. *N.L.R.B.*, 305 U.S. 197, 235-37; *N.L.R.B.* v. *Sands Manufacturing Company*, 306 U.S. 332, 342; *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 338-40; *N.L.R.B.* v. *Rockaway News Supply Company*, 345 U.S. 71. As most recently stated by this Court:

> "* * * the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *N.L.R.B.*, 357 U.S. 93, 108.

How, then, can the Board in these Nabisco cases have carved five plants out of a valid, subsisting col-

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*This is entirely apart from the question of respondents' *Lawrence Leather* discrimination against petitioner whereby, because of petitioner's "identity", its Nabisco contract was held no bar to elections.

lective bargaining contract covering 17 Nabisco plants? There is not here a hint of unfair labor practice. Nor in the Nabisco decisions here attacked (J.A. 17-27) has the Board said a single word about the validity of the contract itself, nor found the contract in any way inconsistent with the objectives or policies of the Act.

Such arbitrary and capricious obliteration of the Nabisco 17-plant contract by the Board constitutes destruction of petitioner's validly acquired contract rights and the taking of its property without due process of law within the meaning of the Fifth Amendment. *Lynch* v. *United States*, 292 U.S. 571, 579; *John McShain, Inc.* v. *District of Columbia*, 92 U.S. App. D.C. 358, 360, 205 F. 2d 882, 884, cert. den. 346 U.S. 900.

4. The questions presented are important.

They are important to the administration of the National Labor Relations Act.

It is important for labor unions to know whether section 9(c)(2) means what it says or, despite its provisions, whether the Act permits the Board to have one rule for unions affiliated with the AFL-CIO and another rule for unions not so affiliated. The error of the court below lay in its failure to see that the Board's decisions in these Nabisco cases as clearly flout the Act as did the Board's action involved in *Leedom* v. *Kyne, supra*. The Board's application of its *Lawrence Leather* rule has penalized petitioner for its affiliation with an organization expelled from the AFL-CIO and thus has effectively denied to the Nabisco employees involved their "right to self-organi-

zation, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" guaranteed by section 7 of the Act, 29 U.S.C. 157. The court below erred in sanctioning the Board's requirements that employees, in order fully to exercise their rights under the Act, must do so only through labor organizations adhering to and in conformity with the presently dominant labor federation, the AFL-CIO. This is a shocking subversion of a statute and of the Constitution "to fit the current fashions." Summers, op. cit., 45 Va. L. Rev. 261, 274. A more important question to the continued existence of a voluntary labor movement can hardly be imagined.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Pertinent portions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947, Act of July 3, 1935, 49 Stat. 449, as amended by the Act of June 23, 1947, 29 U.S.C. 141, 151 *et seq.* provide:

Section 1 of the 1947 Act, 29 U.S.C. 141:

Short Title and Declaration of Policy

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 1 of the 1935 Act, as amended, 29 U.S.C. 151:

Findings and Policies

Section 1. The denial by some employers of the rights of employees to organize and the refusal by

some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The

elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7, 29 U.S.C. 157:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

Section 8(d), 29 U.S.C. 158(d):

UNFAIR LABOR PRACTICES

Sec. 8. . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of

a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Section 9(a), (b), (c), and (d), 29 U.S.C. 159(a), (b), (c), and (d):

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination,

unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified, in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (e) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Administrative Procedure Act, the act of June 11, 1946, 60 Stat. 243, 5 U.S.C. 1009:

JUDICIAL REVIEW

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

RIGHT OF REVIEW

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

FORM AND VENUE OF ACTION

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

REVIEWABLE ACTS

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the

agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

INTERIM RELIEF

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

SCOPE OF REVIEW

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,576

NATIONAL BISCUIT DIVISION (Biscuit Council, Bakery and Confectionery Workers' International Union of America) As bargaining agent and contractual representative of certain employees of the National Biscuit Company, *Appellant*

v.

BOYD LEEDOM, CHAIRMAN, ET AL., individually and as members of the National Labor Relations Board, *Appellees*

Appeal from the United States District Court for the District of Columbia

Decided January 29, 1959

Mr. Abraham J. Harris, with whom *Messrs. John V. Long* and *James H. Heller* were on the brief, for appellant.

Mr. Norton J. Come, Deputy Assistant General Counsel, National Labor Relations Board, with whom *Messrs. Jerome D. Fenton*, General Counsel, National Labor Relations Board, *Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief for appellees.

Messrs. Henry Kaiser, Isaac N. Groner and *Stephen I. Schlossberg* filed a brief on behalf of American Bakery and Confectionery Workers' International Union, AFL-CIO, as *amicus curiae*, urging affirmance.

Before REED, Associate Justice of the Supreme Court, retired,* BAZELON and FAHY, Circuit Judges.

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* Sitting by designation pursuant to the provisions of 28 U.S.C. § 294(a).

PER CURIAM: Appellant, a division of the Biscuit Council, Bakery and Confectionery Workers' International Union of America (hereinafter called BCW), is the bargaining representative for a group of locals in plants of the National Biscuit Company. It negotiated a series of master agreements with the Company, the last expiring on August 31, 1959. In December 1957, however, the BCW was expelled from the AFL-CIO for failure to eliminate certain corrupt practices. Thereafter various locals voted to disaffiliate and joined with the American Bakery and Confectionery Workers (hereinafter called ABC), a new international union chartered by the AFL-CIO. The new locals filed petitions with the National Labor Relations Board under § 9(c) of the National Labor Relations Act[1] for new and separate elections at each plant. Hearings were held in which appellant urged that the current master agreement barred the elections sought and that separate plant units were inappropriate for bargaining. The Board concluded, however, that the schism within and disaffiliation from appellant had so unstabilized the existing bargaining relationship as to warrant the elections sought. The Board, on June 30, 1958, therefore ordered elections in five of the plants.

On July 10, 1958, appellant brought this suit in the District Court against appellees, the Chairman and Members of the National Labor Relations Board, to declare the Board's action unlawful and for injunctive relief. Appellees immediately moved to dismiss on the ground, in substance, that the court was without jurisdiction because Board action in § 9 proceedings is reviewable only in the Court of Appeals and only when such action is the basis for a "final order" in an unfair labor practice proceeding under § 10 of the Act.

The sum of appellees' argument was that the challenged action fell within "the wide area of determinations which

[1] 49 STAT. 453 (1935), as amended, 29 U.S.C. § 159(c) (1952).

depend on the Board's expertise and discretion"[2] and was therefore controlled by our decision in *DePratter* v. *Farmer*.[3] Appellant, on the other hand, urged that the Board went beyond the area of its expertise and discretion and produced the sort of "unlawful action . . . and resulting injury[,] . . . by way of departure from statutory requirements or from those of due process . . ." for which we granted relief in *Leedom* v. *Kyne*, 101 U.S. App. D.C. 398, 249 F. 2d 490 (1957), *affirmed*, —— U.S. —— (Dec. 15, 1958).[4] The Board, said appellant, favored the AFL-CIO as against appellant's independent union in violation of the express command of § 9(c)(2) of the Act which provides:

> In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. . . .

The District Court held that the Board's determination that the elections were warranted in the interest of stable bargaining relationships was within allowable limits of the Board's discretion and was not prohibited by § 9(c)(2). Accordingly, it dismissed the suit on July 17, 1958. This appeal was brought the same day and a request was made for a stay of the elections pending appeal. We denied the request.

Upon consideration of the appeal, we conclude that the District Court was clearly right.

Affirmed.

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[2] *Leedom* v. *Kyne*, 101 U.S. App. D.C. 398, 399, 249 F. 2d 490, 491 (1957), *affirmed*, —— U.S. —— (Dec. 15, 1958).

[3] 98 U.S. App. D.C. 74, 232 F. 2d 74 (1956).

[4] *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 700 (1945).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,576

September Term, 1958
C.A. 1813-58

NATIONAL BISCUIT DIVISION (Biscuit Council, Bakery and Confectionery Workers' International Union of America) As bargaining agent and contractual representative of certain employees of the National Biscuit Company, *Appellant*

v.

BOYD LEEDOM, CHAIRMAN, ET AL., individually and as members of the National Labor Relations Board, *Appellees*

Filed Jan. 29, 1959

Appeal from the United States District Court for the District of Columbia

Before: REED, Associate Justice of the Supreme Court, retired, and BAZELON and FAHY, Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby affirmed.

Per Curiam.

Dated: January 29, 1959.

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No. 869

In the Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL BISCUIT DIVISION (BISCUIT COUNCIL, BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA), PETITIONER

v.

BOYD LEEDOM, ET AL., AS CHAIRMAN, AND AS MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 869

NATIONAL BISCUIT DIVISION (BISCUIT COUNCIL, BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA), PETITIONER

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BOYD LEEDOM, ET AL., AS CHAIRMAN, AND AS MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the District Court dismissing the complaint, and the reasons in support thereof, are set forth at R. 232, 228–230.[1] The opinion of the court below, affirming the District Court, is not yet officially reported, but is set forth at pp. 10a–12a of the petition.

[1] References are to the portion of the record printed as a Joint Appendix to the briefs in the court below.

JURISDICTION

The judgment of the court below was entered on January 29, 1959 (Pet. 13a). The petition for a writ of certiorari was filed on April 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is within the allowable limits of the Board's discretion under Section 9 of the National Labor Relations Act to determine that, where there has been a basic intra-union conflict involving an international union or a federation of unions which results in a realignment at that level followed by related action at the local level, an established bargaining relationship is disrupted to such an extent that the employees should be afforded a new opportunity to express their wishes concerning a bargaining representative in a secret-ballot election, even though the current collective bargaining contract has not yet expired.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 5a–7a of the petition.

STATEMENT

Petitioner Biscuit Division, a labor organization affiliated with the Bakery and Confectionery Workers' International Union of America (hereafter called "BCW"), is the bargaining agency for a group of local unions likewise affiliated with the BCW which represented the employees at 17 biscuit and cracker plants of the National Biscuit Company (hereafter

called "Nabisco"). For several years, the petitioner and the Company had entered into a single master agreement covering all of these plants. The latest such agreement became effective on September 1, 1957, and by its terms was to expire on August 31, 1959. (R. 3–4, 5–7.)

In December, 1957, because of its failure to eliminate certain corrupt influences, BCW was expelled from the AFL–CIO as one of its affiliates, and the AFL–CIO chartered a new international, the American Bakery and Confectionery Workers (hereafter called "ABC"), to exercise jurisdiction in the field previously covered by BCW. As a result of these events, the various locals of BCW, including those concerned in this suit, held meetings in which the membership voted overwhelmingly to disaffiliate from the BCW and to affiliate with the ABC. Subsequently each local applied for and received a charter from ABC. (R. 7–8, 18, 20–21, 23, 25–26.)

The locals which were chartered by ABC, and which had jurisdiction over the respective plants of Nabisco, filed petitions with the Board, pursuant to Section 9(c) of the Act, seeking separate elections for the purpose of enabling the employees at each plant to redetermine their bargaining representative. The Board held hearings on the petitions, and permitted Biscuit Division to intervene in the proceeding. Biscuit Division asserted its outstanding contract with Nabisco as a bar to the proceedings, and contended further that the single plant units sought by the petitioners were inappropriate for bargaining purposes. On June 30, 1958, the Board issued d isions

in five of the cases, directing separate elections at each of five Nabisco plants, to determine whether the employees desired to be represented by the respective locals affiliated with the ABC, by Biscuit Division, or by neither. (R. 8–10, 17, 20, 22, 25.)[2]

Thereupon, Biscuit Division instituted this suit in the District Court, seeking a declaration that the five representation elections directed by the Board among the employees of Nabisco were unlawful, and asking an injunction against the holding of such elections. The gravamen of the complaint was that the Board acted unlawfully in concluding: (1) that the schism within the BCW occasioned by its expulsion from the AFL–CIO, coupled with disaffiliation at the local level, unstabilized the existing bargaining relationship to such an extent as to warrant the holding of representation elections despite the existence of a contract between Biscuit Division and Nabisco; (2) that separate elections should be held for each of the Company's plants. The complaint further alleged that, in so concluding, the Board applied special rules of decision to Biscuit Division, in violation of Section 9(c)(2) of the Act. (R. 10–15.) The Board moved to dismiss the complaint on the grounds that the District Court was without jurisdiction of the subject

[2] See also the Board's decision in *The Great Atlantic and Pacific Tea Company*, 120 NLRB No. 91 (set forth pp. 13–18, *infra*), the first representation proceeding to present the disaffiliation question involved here. The Board relied on this decision in the instant case (see R. 26, n. 2). The Board's action in *A & P* was sustained by the District Court for the Eastern District of Pennsylvania in *Local Union No. 492* v. *Schauffler*, 162 F. Supp. 121.

matter and that the complaint failed to state a claim warranting judicial relief (R. 66–67).

On July 17, 1958, the District Court granted the Board's motion to dismiss the complaint (R. 232). The Court held that the Board's determination that the elections were warranted in the interest of stable bargaining relationships was within the allowable limits of the Board's discretion and was not prohibited by Section 9(c)(2). Accordingly, the Court concluded that there was no such departure from statutory requirements as would confer jurisdiction under the rule of *Leedom* v. *Kyne*, 249 F. 2d 490 (C.A.D.C.), subsequently affirmed in 358 U.S. 184. (R. 228–230.)

On appeal, the court below held that the District Court was "clearly right" and affirmed its order dismissing the complaint (Pet. 10a–12a).

ARGUMENT

The conclusion of both the court below and the District Court—that the petitioner's allegations, that the Board departed from legal requirements in directing the five representation elections complained of, were insubstantial and thus not sufficient to bring this case within *Leedom* v. *Kyne*, 358 U.S. 184[3]—is manifestly correct. Moreover, no conflict of decisions is shown. The instant case accordingly does not warrant review by this Court.

[3] That case permits an exception to the general rule that Board representation determinations are not reviewable in a federal district court in the limited situation where it is plain that the Board has exceeded statutory or constitutional requirements and no other adequate remedy exists for the redress of this wrong.

1. Section 9 of the Act vests the Board with broad discretion to determine the unit appropriate for collective bargaining purposes, and the circumstances under which an outstanding collective bargaining contract will or will not bar a representation election.[4] In formulating its policy as to when an existing contract bars an election, the Board's objective has been to accommodate the twin statutory policies of affording employees full freedom to select a bargaining representative, and of encouraging collective bargaining (see Section 1 of the Act). Thus, the Board has concluded that ordinarily it will not entertain a representation petition in the face of an outstanding collective bargaining contract.

However, the Board has held that an outstanding contract will not bar an election where there has been a basic intra-union conflict involving an international union or a federation of unions, resulting in a realignment at that level followed by related action at the local level. In these circumstances, the established bargaining relationship is clearly disrupted and confusion is created as to which faction is the employees' representative; hence the existing contract can no longer be said to stabilize industrial relations between the employer and his employees. It is therefore an

[4] *National Labor Relations Board* v. *Grace Co.*, 184 F. 2d 126, 128 (C.A. 8); *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 210 F. 2d 852, 857 (C.A. 7); *National Labor Relations Board* v. *Efco Manufacturing, Inc.*, 203 F. 2d 458, 459 (C.A. 1); *National Labor Relations Board* v. *Libby-Owens-Ford Glass Co.*, 241 F. 2d 831, 836 (C.A. 4). See also, *Fay* v. *Douds*, 172 F. 2d 720, 724 (C.A. 2); *National Labor Relations Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14, 16–18 (C.A. 2).

appropriate occasion to afford the employees a new opportunity to express their wishes concerning a bargaining representative in a secret-ballot election. *A. C. Lawrence Leather Company*, 108 NLRB 546; *Wade Manufacturing Co.*, 100 NLRB 1135; *Hershey Chocolate Corp.*, 121 NLRB No. 124.[5]

The Board found that such a schism was presented here and for that reason concluded that the petitioner's outstanding contract with Nabisco would not bar elections at this time (see R. 18, n. 3; 25–26, n. 2). In the light of the facts before the Board concerning the split within the BCW International over corruption, the chartering of the new ABC, and the ensuing disaffiliation action at the local levels, the Board's finding of a schism was fully warranted. Thus, as appears from the Board's decision in *The Great Atlantic and Pacific Tea Company*, 120 NLRB No. 91 (pp. 13–18, *infra*), which was incorporated by reference in one of its decisions herein (R. 25–26, n. 2), charges of corruption were preferred against certain officials of the BCW in March 1957, and as a result a "reform" group led by five International officers, was organized; in December 1957, after the BCW refused to remove the officials in question, the AFL–CIO convention voted to expel it on grounds of corruption; the AFL–CIO then issued a charter for a new International, ABC, to the former BCW "reform" group. See also, *Hershey Chocolate Corp.*, 121 NLRB No. 124. The split at the International level

[5] Copies of this decision are included in the record lodged with the Court.

was followed by disaffiliation action at the local level. For example, as the *A & P* decision further shows (p. 15, *infra*), Local 492, the local having jurisdiction over Nabisco's Philadelphia and York plants, mailed notice of a general membership meeting to all local shops, to consider what action, if any, the local should take in view of the recent upheavals involving its national affiliate. At this meeting, attended by a substantial number of the Local's members, those present unanimously adopted a resolution disaffiliating from BCW and its Local 492, and directing all officers to retain their offices, protect the Local's assets, and apply to the new International Union, ABC, for a charter. See also R. 18, n. 3, R. 21, n. 3, R. 23, n. 2, R. 25, n. 2.

In these circumstances, it was reasonable to give Nabisco's employees a chance to redetermine their bargaining representative, even though a contract with petitioner was still outstanding.

2. The petitioner misconceives the basis for the Board's rule in the case of schisms in contending (Pet. 8–14) that it is applicable only where an international union has been expelled from the AFL–CIO, and thus discriminates against unaffiliated unions in violation of Section 9(c)(2) of the Act.* Although it is true that the Board has found a schism warranting the holding of an immediate election in the

* In relevant part, this Section provides that:

In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought * * *.

situation where an international union has been expelled from the AFL–CIO,[7] this has not been the only situation in which such a schism has been found. In *Wade Manufacturing Company*, 100 NLRB 1135, for example, a schism warranting the holding of an election notwithstanding an existing contract was found even though there had been no expulsion. There, as a result of policy differences which developed at the 1952 national convention of the Textile Workers Union of America, CIO, one of its Joint Boards, which served as the policy-making body for a number of locals, voted overwhelmingly to leave TWUA and affiliate with another international, United Textile Workers of America, AFL. This was, in turn, followed by disaffiliation action at the local level. The Board ordered an election because "as the result of a schism in the ranks of the Intervenor [TWUA] directly affecting the employees at the Employer's plant, conflicting claims of the Petitioner [UTW] and the Intervenor have been made, causing serious confusion in the bargaining relationship between the Employer and the representative of its employees" (*Id.*, at 1138).[8] Similarly, the Board's re-

[7] See *A. C. Lawrence Leather Company*, 108 NLRB 546, and the instant cases.

[8] The schism within the TWUA involved in *Wade*, *supra*, also affected other plants, leading to a series of similar directions of election. *Erwin Mills, Inc.*, 101 NLRB 316; *Franklin Throwing Company*, 101 NLRB 153; *Bryant Finishing Co., Inc.*, 101 NLRB 422; *Bellman Brook Bleachery Company*, 101 NLRB 297. Moreover, the fact that the Board's schism doctrine is longstanding and not dependent upon the expulsion of an international from a parent federation is further shown by its application to the 1939 intra-union split in the United Auto

cent restatement of the rule in *Hershey Chocolate Corp.*, 121 NLRB No. 124 (see n. 5, *supra*, p. 7), makes plain that "any realignment affecting an international union or federation of unions, resulting from a policy conflict" (mimeo dec., p. 9), followed by related action at the local level, would constitute the type of schism warranting the holding of an election notwithstanding an existing contract.

In sum, it is apparent that the Board's rule as to schisms does not discriminate against unaffiliated unions, for it turns, not on whether a union is affiliated with a parent federation or has been expelled therefrom, but rather on whether there has been a basic intra-union conflict which has muddied the "representation waters," causing a change at the international level and disruption at the local level. Although a frequent cause of this disruption is the expulsion of an international union from a parent federation, the same condition may result from other circumstances as well. The Board's rule is the same whatever the cause, for it is the effect on the bargaining relationship and not the cause of the disruption which is relevant for the Board.

3. Equally insubstantial is petitioner's contention (Pet. 14–15) that the Board, in any event, lacks authority to direct elections during the term of an otherwise valid collective bargaining agreement. Petitioner acknowledges that the Board's rule that it will not ordinarily hold an election during the term of a

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Workers, which resulted in the formation of the UAW-AFL. *Brewster Aeronautical Corp.*, 14 NLRB 1024; *Midland Steel Products Co.*, 17 NLRB 936.

collective bargaining contract is authorized by the Act, but fails to recognize, as the case which it relies on specifically adds, that this policy also includes the corollaries thereto, *i.e.*, the circumstances under which the contract would be "lifted." *Fay* v. *Douds*, 172 F. 2d 720, 724 (C.A. 2). Hence, as the authorities cited n. 4, *supra*, p. 6, have uniformly held, the Board has power to order elections in the face of an outstanding contract where, as here, the contract can no longer be said to stabilize bargaining relationships and a redetermination of the bargaining representative would thus effectuate the policies of the Act.[*]

Nor is this analysis impaired by the cases (Pet. 15) which indicate that the Board may not police collective bargaining contracts and strike down contractual provisions which do not contravene the unfair labor practice sections or other basic policies of the Act. In deciding whether to direct an election in the face of an outstanding contract, the Board does not nullify or set aside the contract as such, but merely decides whether the contract should preclude the employees

[*] In amending the Act, Congress evidenced an intention not to alter the Board's policies as to when an existing contract bars an election. See Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948), pp. 431, 554. Moreover, Section 8(d) of the amended Act expressly confirms the Board's authority to conduct a representation election in the midst of an otherwise valid contract. The latter part of that Section provides that the preceding limitations on the right to strike during the life of a collective bargaining contract shall be "inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or has ceased to be the representative * * *."

from redetermining their bargaining representative. Whether and to what extent the contract remains in effect after such action is a question left for future proceedings and negotiations between the parties.[10]

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1959.

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[10] See *Modine Mfg. Co.* v. *I.A.M.*, 216 F. 2d 326 (C.A. 6); *American Seating Co.*, 106 NLRB 250; *Boston Machine Works Co.*, 89 NLRB 59; Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 8–14.

APPENDIX

120 N.L.R.B. No. 91

United States of America

Before the National Labor Relations Board

Case No. 4–RC–3552

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, EMPLOYER

And

LOCAL 492, AMERICAN BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL–CIO, PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Bernard Samoff, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.[1]

[1] The hearing officer permitted Bakery and Confectionery Workers International Union of America, herein called Bakery Workers, and its Local 492, herein called Local 492, to intervene on the basis of Local 492's current contract with the Employer covering the employees involved. The Petitioner ob-

3. The Petitioner seeks an election among the production employees of the Employer's Philadelphia, Pennsylvania, bakery. The Employer and the Intervenors contend that the contract of Local 492 (the intervening local) is a bar. The Petitioner contends that the contract is not a bar because a schism has occurred, and because Local 492 is defunct.

Local 492 is an amalgamated local union which represents employees of 13 employers in Pennsylvania. Originally a direct affiliate of AFL, Local 492 later was chartered by Bakery Workers, which eventually became affiliated with AFL–CIO through the merger of those two parent organizations. Local 492 was recognized by the Employer as the representative of the employees herein involved in 1940 and has executed successive contracts covering them since that time. The most recent contract, which is asserted as a bar, is effective from January 1, 1957, until October 1, 1958.

After proceedings initiated by it as the result of charges of corruption preferred against Bakery Workers' officials in March 1957, the AFL–CIO convention voted on December 9 to expel Bakery Workers, effective December 12, on grounds of corruption. On December 12, AFL–CIO chartered American

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jects to the intervention of Local 492, and contends it is not a labor organization, on the ground that it is defunct. The Petitioner also objects to the intervention of Bakery Workers on the ground that it is not a party to the contract. The objections are overruled. We find, for the reasons stated below, that Local 492 is not defunct. As it admits employees to membership and negotiated the current contract, we find that it is a labor organization; and as a party to the contract, it is entitled to intervene. Bakery Workers, as the International with which the contracting Local is affiliated, and which is administering the affairs of Local 492 through a trustee, also has a sufficient interest to be entitled to intervene.

Bakery and Confectionery Workers International Union, herein called American Bakery Workers.[2]

Local 492, pursuant to notices previously mailed to all member shops, called a special meeting of its members on December 11. Approximately 400 of its 2600 members attended,[3] and unanimously adopted a resolution disaffiliating from Bakery Workers for reasons related to its expulsion from AFL–CIO; directing all officers to retain their offices, protect the Local's assets, and apply to the new international, American Bakery Workers, for a charter. The charter was subsequently granted. A majority of Local 492's members have signed a petition endorsing the action taken at the meeting, 2183 members have signed cards disaffiliating from Bakery Workers and authorizing the Petitioner to represent them, and 2107 have signed the Petitioner's check-off cards. Of the Employer's average complement of 230 to 260 employees, 245 have signed cards disaffiliating from Bakery Workers and authorizing the Petitioner to represent them. All members of the shop committee at the instant plant have defected to the Petitioner. The Petitioner has advised the Employer of the foregoing change in affiliation, and, through the shop committee at the instant plant, has taken over administration of the contract, processing grievances at weekly meetings with management.

Bakery Workers has removed the defecting officers of its Local 492 and has appointed a trustee and assistant trustees for the Local. The trustee has established a new office and has held meetings of small

[2] The charter was granted to a dissident group within Bakery Workers, led by 5 officers of the International known as "Committee to Preserve Integrity in the Bakery and Confectionery Workers International Union of America, AFL–CIO."

[3] The usual attendance at Local 492 membership meetings was 200 to 275.

groups of employees, some of whom signed cards declaring their loyalty to Bakery Workers. Although the trustee has not handled any grievances, he informed the Employer of his appointment and claims to be ready, willing, and able to administer the contract. The Employer is holding checked-off dues in escrow.

In the light of the foregoing, it is apparent the Bakery Workers Local 492 is not defunct. Even though most of its members and all its officers have defected, a trustee and assistant trustees appointed by Bakery Workers are actively carrying on its affairs from a new office, have informed the Employer to that effect, and have contacted members and held meetings. Some of Local 492's members have remained loyal. It is willing to, and capable of, administering its contract.[4]

However, the Board has held, under circumstances similar to those existing here, that the expulsion of an international union from its parent organization, coupled with disaffiliation action at the local level for reasons related to the expulsion, disrupts and confuses the established bargaining relationships between the employer and the representative of the employees, creating a schism which warrants the holding of an election despite the existence of a contract between such representative and the employer.[5] A departure from this principle is not warranted by the fact that the disaffiliation action may have violated the constitutions and by-laws of Local 492 and Bakery Work-

[4] *The Youngstown Steel Door Company*, 116 N.L.R.B. 986. Cf. *John Deere Plow Works of Deere & Co.*, 115 N.L.R.B. 923, p. 925.

[5] *A. C. Lawrence Leather Company*, 108 N.L.R.B. 546.

ers,[6] or did not meet all the formalities which the Board in some cases has required.[7] We therefore find that a schism exists[8] and that the contract does not

[6] *Globe Forge, Inc.*, 115 N.L.R.B. 862. We find no merit in the Intervenors' contention that the disaffiliation-affiliation action was directed by a rival union engaged in raiding activities. It is clear that the movement was led by a dissident group within the Bakery Workers Union itself and not by a raiding, outside union (see fn. 2 above).

[7] In view of the nationwide publicity surrounding the Bakery Workers' expulsion proceedings, the efforts of both factions in the Union to explain their positions to all locals and their members, and the discussions of these matters by the members at meetings prior to December 12, we find without merit the Intervenors' contention that the notice sent to all shops for posting, announcing the December 11 meeting of Local 492, did not adequately advise the members of the purpose of the meeting. Written on Local 492's letterhead, the notice stated: "Attention. Attention. To All Members. There will be a general membership meeting at the Dobbins Vocational School, 22nd & Lehigh Avenue, Philadelphia, Penna. on Wednesday, December 11, 1957, at 8:00 P.M. Matters of great importance to everyone will be discussed and voted upon. Therefore, everyone is urged to attend this important meeting. Fraternally yours, John D. Nicola, Secretary-Treasurer." See *A. C. Lawrence Leather Company*, 113 N.L.R.B. 60; *Empire Zinc Division, The New Jersey Zinc Company*, 108 N.L.R.B. 1662. The Local 492 disaffiliation meeting occurred on December 11, one day before Bakery Workers' expulsion from AFL–CIO became effective on December 12. However, the meeting occurred 2 days after the AFL–CIO convention voted for expulsion on December 9. We therefore find, contrary to the contention of the Intervenors, that the Local 492 disaffiliation was not premature.

[8] In view of our decision herein, we find it unnecessary to, and therefore do not, pass upon the Petitioner's other objections to the contract. Nor do we pass upon the obligations of the parties with respect to the contract, as requested by the Employer. *John Deere Plow Works of Deere & Co.*, 115 N.L.R.B. 923.

bar an election at this time.[9] Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c) and Section 2 (6) and (7) of the Act.[10]

4. In accord with the agreement of the parties, we find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. All production employees at the Employer's bakery, Ridge Avenue and Sedgely Streets, Philadelphia, Pennsylvania, excluding drivers, salaried employees, confidential employees, and supervisors as defined in the Act.

DIRECTION OF ELECTION

[Omitted]

[9] The Petitioner's alternative request that the Board declare that it has succeeded to Local 492's contract and dismiss the petition is denied. *Prudential Insurance Company*, 106 N.L.R.B. 237, relied on by the Petitioner, is inapposite. In that case an employer petition was dismissed on motion of the union to which the contract had been assigned in connection with a disaffiliation action, the Board finding that the union had succeeded to the contract. Here, there was no assignment. Moreover, it is clear that the Petitioner may not, after raising a question concerning representation by filing a petition, thereafter assert what it alleges to be its own contract as a bar. *Puerto Rico Cement Corp.*, 97 N.L.R.B. 382. The other cases cited by the Petitioner are inapposite because they did not involve schism situations.

[10] We find no merit in the Intervenors' contention that a free election cannot be held because of the Petitioner's seizure of Local 492's assets. There is no indication that the assets have been disbursed to the Petitioner's advantage, as was done in *Kearney & Trecker Corp.* v. *N.L.R.B.*, 210 F. 2d 852 (C.A. 7), relied on by the Intervenors.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 869

NATIONAL BISCUIT DIVISION, ETC., *Petitioner*,

v.

BOYD LEEDOM, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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1. The Government relies heavily (Br. in Op., pp. 8-9) on the Board's decision in *Wade Manufacturing Company*, 100 NLRB 1135, to demonstrate that its so-called schism doctrine does not discriminate against expelled unaffiliated unions in violation of section 9(c)(2) of the Act.[1] The argument is deceptive. For whatever the factual situation was in *Wade Manufac-*

[1] The Brief in Opposition tacitly concedes (p. 8) that discrimination against unaffiliated unions would be such a violation.

turing and regardless of what the Board may there have held, the fact is that in the instant Nabisco cases, the Board relied solely on its *Lawrence Leather* (108 NLRB 546) doctrine (Pet., pp. 10-11), a rule whose very statement relies on disaffiliation and expulsion and thereby involves the proscribed discrimination (Pet., pp. 11-14). Moreover, *Wade Manufacturing* not only antedated *Lawrence Leather* by two years, but also was completely superseded by the latter case and never thereafter was relied upon by the Board.

It is thus completely beside the point whether the rule expounded in *Wade Manufacturing* violated section 9(c)(2) (Br. in Op., p. 9). The issue here is whether the *Lawrence Leather* schism doctrine as applied in these Nabisco cases resulted in such a violation. We submit that this question can be answered only in the affirmative.

In any event, Government counsel may not now defend the Board's action in these Nabisco cases on a ground entirely different from that stated therein by the Board itself. See *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 95; *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 196.

2. It is disingenuous for the Government now to argue (Br. in Op., pp. 11-12) that by directing an election "in the face of an outstanding contract, the Board does not nullify or set aside the contract as such" but that the fate of the contract "is a question left for future proceedings and negotiations between the parties." How can this be squared with the Board's recent holding in *Hershey Chocolate Corporation*, 121 NLRB No. 124 (a decision upon which the Solicitor

General himself places considerable reliance (Br. in Op., pp. 7, 10)), that

> "in accord with established practice, we also believe that, in a representation proceeding, it would be inappropriate to require the winning union, if any, to assume the existing contract." (121 NLRB No. 124, mimeo dec., p. 13).

This is just the sort of Board nullification of contracts not in themselves violative of the policies of the Act against which this Court has often spoken. See Pet., p. 15, and cases there cited.

For the foregoing reasons and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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